Supreme Court, U. S.
FILED
DEC 31 1975
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

October Term, 1974

No. 74-1563

THE CITY OF EASTLAKE, *et al.*,
Petitioners,

vs.

FOREST CITY ENTERPRISES, INC.
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF FOR RESPONDENT

WILLIAM D. GINN
MICHAEL M. HUGHES
STEPHEN L. BUESCHER
THOMPSON, HINE AND FLORY
1100 National City Bank Building
Cleveland, Ohio 44114
Attorneys for Respondent

J. MELVIN ANDREWS
35475 Vine Street
Eastlake, Ohio 44094
Attorney for Petitioners

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-3647

TABLE OF CONTENTS

QUESTION PRESENTED 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. The Supreme Court of Ohio Correctly Found that Zoning Through Voter Consent, as Required by the Eastlake Charter, was Not a Proper Exercise of the Police Power Under the Standards of *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) and Was Violative of the Due Process Clause of the Fourteenth Amendment 5

II. The Decision of the Ohio Supreme Court Reaffirms the Constitutional Mandate from *Euclid v. Ambler* of Rational Decision Making, Keyed to a Comprehensive Plan, and Is Thus Supportive of Related State, Federal and Judicial Policies 14

III. The Decision of the Supreme Court of Ohio Does Not Impair the Right of the People to Vote 19

CONCLUSION 23

APPENDIX 25

TABLE OF AUTHORITIES

Cases

Berman v. Parker, 348 U.S. 26 (1954) 8

Bird v. Sorenson, 16 Utah 2d 1, 394 P.2d 808 (1964) 20

Board of Supervisors of Fairfax County v. Williams, 216 Va. 49, 216 S.E.2d 33 (1975) 18

Bristow v. City of Woodhaven, 35 Mich. App. 205, 192 N.W.2d 322 (1971) 18

Cheney v. Village 2 at New Hope, Inc., 429 Pa. 626, 241 A.2d 81 (1968) 16

Cooper v. City and County of Denver, 536 P.2d 874 (Colo. 1975) 20

Eubank v. City of Richmond, 226 U.S. 137 (1912) 4, 9, 11, 12

Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) 3, 4, 5, 7, 8, 9, 10, 11, 12, 13, 14, 16, 18, 19, 23

Fasano v. Board of County Com'rs of Washington City, 264 Ore. 574, 507 P.2d 23 (1973) 20

Fleming v. City of Tacoma, 81 Wash. 2d 292, 502 P.2d 327 (1972) 20

Girsh, Appeal of, 437 Pa. 237, 263 A.2d 395 (1970) .. 18

Hetrick's Appeal, In re, 391 Pa. 148, 137 A.2d 310 (1958) 11

James v. Valtierra, 402 U.S. 137 (1971) 4, 20, 21

Kit-Mar Builders, Inc., Appeal of, 439 Pa. 466, 268 A.2d 765 (1970) 18

McGautha v. California, 402 U.S. 183 (1971) 6

C. Miller Chevrolet v. Willoughby Hills, 38 Ohio St. 2d 298, 313 N.E.2d 400 (1974) 14

National Land and Investment Co. v. Kohn, 419 Pa. 504, 215 A.2d 597 (1965) 18

Ranjel v. City of Lansing, 417 F.2d 321 (1969) *cert. den.* 397 U.S. 980 21

Robwood Advertising Ass'n, Inc. v. City of Nashua, 102 N.H. 215, 153 A.2d 787 (1959) 11

Schalte v. Garnett, 186 Kan. 117, 348 P.2d 629 (1960) 11

Southern Alameda Spanish Speaking Organization v. City of Union City Cal., 424 F.2d 291 (9th Cir. 1970) 21

Southern Burlington City NAACP v. Twp. of Mt. Laurel, 67 N.J. 151, 336 A.2d 713 (1975) *(appeal dismissed* 44 U.S.L.W. 3181) 18

Thomas Cusack Co. v. City of Chicago, 242 U.S. 526 (1917) 11

Udell v. Haas, 21 N.Y.2d 463, 288 N.Y.S.2d 888, 235 N.E.2d 897 (1968) 14

Washington, ex rel. Seattle Title Trust Co. v. Roberge, 278 U.S. 116 (1928) 4, 10, 11, 12

West v. City of Portage, 392 Mich. 458, 221 N.W.2d 303 (1974) 20

Texts

1 R. ANDERSON, AMERICAN LAW OF ZONING §1.02 at 6 (1968) 5

1 R. ANDERSON, AMERICAN LAW OF ZONING §1.03 at 8 15

1 ANDERSON, AMERICAN LAW OF ZONING §4.02-4.03 at 156-59 20

3 ANDERSON, AMERICAN LAW OF ZONING §17.14 at 307 16

E. FREUND, THE POLICE POWER §16 at 11 (1904) 6

Haar, *In Accordance with A Comprehensive Plan*, 68 HARV. L. REV. 1154 (1955) 14

I MCHARG, DESIGN WITH NATURE 93 (paperback ed. 1971) 15

S. TOLL, ZONED AMERICAN 117 (1969) 5

Statutes, Constitution and Charters

Charter of the City of Eastlake, Article VIII 12

Codified Ordinances of the City of Eastlake 1165.02 12

Federal Water Pollution Control Act (Amended 1972) 16

1954 Housing Act 15

Ohio Revised Code:

§122.06 15

§303.12 22

§519.12 22

§713.23 15

33 U.S.C. §1251(a)(5) (Sup. II, 1972) 16

33 U.S.C. §1288(b) (Supp. II, 1972) 16

40 U.S.C.A. §461(a) *as amended* (Supp. 1975) 16

40 U.S.C.A. §461(b) *as amended* (Supp. 1975) 16

United States Constitution, Fourteenth Amendment 3, 5

Supreme Court of the United States

October Term, 1974

No. 74-1563

THE CITY OF EASTLAKE, *et al.*,
Petitioners,

vs.

FOREST CITY ENTERPRISES, INC.
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF FOR RESPONDENT

QUESTION PRESENTED

Is an owner of land deprived of due process by a requirement that any change in use of his land, although duly validated by all appropriate municipal administrative and legislative bodies, must, *as a precondition to effectiveness*, be first submitted by the landowner to the general electorate for their consent and receive a 55% affirmative vote?

STATEMENT OF THE CASE

Existing land uses in the City of Eastlake cannot be changed in any way under its Charter unless and until an applicant

> . . . first submits the required change to the City Planning Commission for approval or disapproval;
>
> . . . thereafter submits to a public hearing before the City Council and obtains Council's approval of the change; and
>
> . . . only after Council has adopted the land use change, submits the change to the electorate at the next regular (November) or special (May) election.

The zoning change, notwithstanding its approval after public hearing by City Council, cannot become effective unless it receives a 55% favorable vote from the City's electors; and if the change fails to receive the required consent of the electors, it cannot be resubmitted for at least a year and then only if the applicant has renewed the process with a fresh submission to the Planning Commission and the Council.

This ballot box zoning scheme was adopted by Charter amendment in November, 1971. In May of that year respondent had requested that the zoning on a parcel of vacant property which it owns in Eastlake be changed from an existing industrial use classification to one which would permit construction of a conventional apartment building. Both the Planning Commission and the City Council approved the requested change in December, 1971. However the Charter amendment had intervened. The approved rezoning could not, therefore, become effective without the vote of the people. Respondent objected that the amended charter was invalid. The City, nevertheless, submitted the proposed change to the electorate at the

May, 1972 election and it failed to receive the requisite 55% favorable vote.

Respondent then challenged the constitutional validity of this requirement of 55% voter consent for changes in land use. The action of the electorate in refusing to approve the particular change proposed for the use of respondent's parcel, notwithstanding the determination of reasonableness by the Planning Commission and Council, is not in issue. Rather the challenge here involves the unconstitutionality, on its face, of the so-called mandatory referendum requirement that any changes in land use, no matter how inconsequential to the voters as a whole, be approved by a 55% majority of the voting electorate.

Respondent believes, and the Ohio Supreme Court held, that this procedure for mandatory voter consent is inconsistent with the procedural due process required under the Fourteenth Amendment for a valid exercise of the police power. For the reasons set forth herein, that decision should be affirmed.

SUMMARY OF ARGUMENT

I

The Supreme Court of Ohio correctly found that the ballot box zoning procedure provided for by the Eastlake Charter constituted a denial of procedural due process under the Fourteenth Amendment. The Eastlake Charter subjects an owner of property to a process which permits the electorate to make a police power decision concerning the use of his property without reference to any ascertainable standards, and in the face of a determination by the City Council that the proposed use is in accordance with the public interest. Such a procedure is destructive of the process which is the crux of *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); and the prior consent principles

embodied in the Eastlake scheme have already been condemned by this Supreme Court in *Eubank v. City of Richmond*, 226 U.S. 137 (1912) and *Washington, ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928).

II

The decision of the Supreme Court of Ohio recognizes the essentiality of planning in the zoning process. A comprehensive zoning plan, which contemplates and provides a rational basis for making changes, was central to *Euclid*. The plan, which takes into account the needs of a dynamic community, provides the constitutionally essential reference for assessing proposals for changes in land use. The Eastlake scheme for ballot box zoning, a simplistic and effective mechanism for perpetuating the status quo, lacks the rationality and measurability required under due process before the police power can be exercised to restrict individual property rights.

III

The Supreme Court of Ohio dealt with the appropriateness of ballot box decision making as a part of the zoning process and found that such decision making, in its failure to provide for the application of rational standards, is inconsistent with the due process protections required when a specific individual's proposed use of his land is directly at issue. This holding, which preserves the rationality required by *Euclid* in assessing the myriad of technical land use considerations involved in administering a comprehensive zoning plan, is entirely consistent with *James v. Valtierra*, 402 U.S. 137 (1971), which dealt not with the use of the police power to restrain individual property rights, but with the development, construction or acquisition of low-rent housing by public bodies, where the decision could lead to large expenditures of local governmental funds.

ARGUMENT

I. THE SUPREME COURT OF OHIO CORRECTLY FOUND THAT ZONING THROUGH VOTER CONSENT, AS REQUIRED BY THE EASTLAKE CHARTER, WAS NOT A PROPER EXERCISE OF THE POLICE POWER UNDER THE STANDARDS OF EUCLID v. AMBLER REALTY CO., 272 U.S. 365 (1926) AND WAS VIOLATIVE OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

Communities have long sought to regulate the private use of land so as to preclude uses perceived to be contrary to the common good. Restrictive covenants and the common law of nuisance provided primitive mechanisms for such regulation and for balancing the property rights of the individual land owner against the welfare of his neighbors.[1] By the turn of the century the developing police power of the states had been asserted to impose building codes, height limitations and restrictions on certain noxious industries. But it shortly became clear that such limited exercises of the police power were not sufficient to meet the complex problems encountered in the urban centers.[2]

The response to urbanization was the then new concept of comprehensive planning for community development.[3] By planning for the varied uses involved in an urban community, and by using an expanded police power to enforce the plan, the community could progress toward its goal of orderly development.

Inherent in a valid exercise of the police power is the requirement that the power be used reasonably and in accordance with a procedure to insure a proper balancing of individual rights and public welfare, with the goal

---

[1] 1 R. ANDERSON, AMERICAN LAW OF ZONING §1.02 at 6 (1968).

[2] *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 386-388 (1926).

[3] While there are some early American examples of town planning, such as Major L'Enfant's design for Washington, D. C., urban planning, as a distinct discipline, did not come into being until the late nineteenth century. S. TOLL, ZONED AMERICAN 117 (1969).

of protecting both.[4] This balancing of public and private interests is especially sensitive in the area of *rezoning* where the choices to be made bear directly and immediately on the rights of the individual property owner. To insure that the balance is made, due process requires that the decision making procedure itself be such that it prevents variations from one case to the next which reflect "merely random or arbitrary choice." *McGautha v. California*, 402 U.S. 183, 248 (1971) (Brennan, J., dissenting).[5]

In land use and zoning, the due process requirement can be met only by the application of consistent standards to the choices to be made. On this score Eastlake's procedure is inherently deficient. Instead of mandating the application of standards, the Eastlake Charter substitutes ballot box decision making, which is clearly not translatable into standards, for the reasoned and discernable decision of a legislative body. It is because of this need to infer and apply standards that

> due process requires that procedures for the exercise of state power be structured in such a way that, ultimately at least, fundamental choices among competing state policies are resolved by a responsible organ of state government. 402 U.S. at 256 (citations omitted).

The constitutional necessity under due process that the procedure used to impose or change restrictions on the private use of land be referable to ascertainable standards had its inception, along with modern zoning and land

[4] E. FREUND, THE POLICE POWER §16 at 11 (1904).

[5] While *McGautha* involved the issue of jury sentencing, Mr. Justice Brennan, in urging the establishment of appropriate standards for the exercise of the sentencing power, made a complete review of the requirements of due process which are particularly relevant to rezoning.

use planning, in *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

In 1922 the City of Euclid, Ohio,[6] a suburb of Cleveland, following the then developing trend, adopted an ordinance establishing a comprehensive zoning plan. The entire area of Euclid was divided into six use districts, ranging from U-1, restricted to single family dwellings and certain public uses, to U-6 which encompassed the least desirable uses such as air fields and gasoline storage. A seventh class of uses was prohibited altogether. The plan also designated height districts, restricting the height of permitted buildings, and area districts, prescribing minimum square footage requirements for permitted buildings.

Ambler Realty Co. challenged the Euclid ordinance as depriving it of its property without due process and on equal protection grounds. The specific issue, as presented to this Court, was whether the ordinance violated the "constitutional protection 'to the right of property in the appellee by attempted regulations under the guise of the police power, which are unreasonable and confiscatory?' " 272 U.S. at 386.

In finding that the Euclid zoning ordinance was a proper exercise of police power, Mr. Justice Sutherland articulated the required standards against which all similar exercises of police power have since been measured: Zoning provisions are unconstitutional when they "are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." 272 U.S. at 395.

In their application, the dual standards of reasonableness and a substantial relation to the public health, safety, morals or general welfare must be flexible to meet chang-

[6] The City of Euclid, while it does not presently have a consent ordinance in place, is a participant in this case as an amicus curiae on behalf of petitioner.

ing conditions. All regulations of land use, however, must "find their justification in some aspect of the police power, asserted for the public welfare."[7] Then, as now, a comprehensive plan forms the constitutionally necessary link between public health, safety, morals and general welfare, on the one hand, and specific restraints on the use and development of private property on the other.

Euclid v. Ambler also recognized the balancing of interests inherent in any zoning or rezoning. The legislative body of the City of Euclid had determined that the comprehensive zoning scheme was in the best interests of the community at large and bore the required relationship to the public health, safety, morals and general welfare. Mr. Justice Sutherland gave this legislative determination a presumption of validity and tested the comprehensive plan to determine whether the justifications for its restrictions were sufficient to preclude a finding that they were arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare. The Court noted the "painstaking consideration" which the zoning plan had received "at the hands of commissions and experts." 272 U.S. at 394. The results of their investigations were set forth in comprehensive reports, giving a legislative history for the plan, much as a planning commission report does today. This painstaking consideration of the plan by the experts played a major role in the presumption of validity accorded Euclid's zoning ordinance; it was clear that the legislative body had itself tested the plan and the underlying reasons for its enactment.

The thrust of this Court's decision in *Euclid v. Ambler* is that the use and development of private property cannot

[7] 272 U.S. at 387. This Court has recognized the need for a flexible definition of public welfare, but has not abandoned the necessity of applying standards to the exercise of police power. *See Berman v. Parker*, 348 U.S. 26 (1954).

be regulated by government unless it is shown that the regulation is reasonable and that it has a substantial relation to public health, safety, morals or general welfare. *By its very nature ballot box zoning is neither reasonable nor relevant to public health, safety, morals or general welfare.* Respondent believes, and the Ohio Supreme Court held, that the mandatory consent procedure required by the Charter of the City of Eastlake is repugnant to and destructive of the balancing process which is the crux of *Euclid v. Ambler* and the cornerstone of modern land use planning and zoning.

Eubank v. City of Richmond, 226 U.S. 137 (1912) preceded *Euclid v. Ambler* and foreshadowed the required presence of standards in a context similar to the present case.

Eubank involved an ordinance which provided that a building line would be established along a street upon request of two-thirds of the abutting property owners. The plaintiff in error had received a permit to build a house according to plans and specifications which had been approved by the building inspector. Shortly thereafter two-thirds of the property owners on the side of the street where plaintiff in error's lot was situated petitioned for establishment of a building line for the street and, in accordance with the ordinance, the building line was established coincident with the line of a majority of the existing houses. The plaintiff in error was informed that his house, which was not as yet under construction, must conform; and it did so, except for an octagonal bay window which extended about three feet over the line.

Having been fined for violation of the line, plaintiff in error attacked the validity of the ordinance on the ground that it deprived him of his property without due process of law. This Court agreed and held constitutionally objectionable an ordinance which,

> while conferring the power on some property holders to virtually control and dispose of the property rights of others, *creates no standard by which the power thus given is to be exercised;* in other words, the property holders who desire and have the authority to establish the line may do so solely for their own interest or even capriciously. 226 U.S. 143-144 (emphasis supplied).

This Court observed that "even so arbitrary a thing as taste" might control the decision, 226 U.S. at 144, and the question critical to *Euclid v. Ambler,* and to the present case was posed:

> In what way is the public safety, convenience or welfare served by conferring such power? 226 U.S. at 143.

Similarly, in *Washington, ex rel. Seattle Title Trust Co. v. Roberge,* 278 U.S. 116 (1928), which followed *Euclid v. Ambler,* the trustee of a home for the aged sought to replace an existing building with an enlarged structure. A Seattle ordinance, amending the City's comprehensive zoning plan, permitted the erection of the new structure, but made such approval subject to the trustee's obtaining written consent of two-thirds of the adjacent landowners. The trustee was unable to obtain the required consents and challenged the validity of the ordinance. This Court eliminated the consent requirement as unconstitutional. The adjacent landowners, Mr. Justice Butler wrote,

> are not bound by any official duty, but are free to withhold consent for selfish reasons or arbitrarily and may subject the trustee to their will or caprice. *Yick Wo v. Hopkins,* 118 U.S. 356, 366, 368. The delegation of power so attempted is repugnant to the due process clause of the Fourteenth Amendment. *Eubank v. Richmond,* 226 U.S. 137, 143. *Browning v. Hooper,* 269 U.S. 396. 278 U.S. at 122.

As if to anticipate the very situation here presented of a zoning change approved by Council, after a public

hearing, followed by inability to obtain consent from the voters, Mr. Justice Butler observed:

> [T]here is no legislative determination that the proposed building and use would be inconsistent with public health, safety, morals or general welfare. The enactment itself plainly implies the contrary. The grant of permission for such building and use, although purporting to be subject to such consents, shows that *the legislative body found that the construction and maintenance of the new house was in harmony with the public interest and with the general scope and plan of the zoning ordinance* . . . 278 U.S. at 121 (emphasis supplied).

The key to *Eubank* and *Roberge,* as in *Euclid v. Ambler,* is that an exercise of the police power designed to restrain the private use of land must be imbued with the dual standard of reasonableness and relation to the public health, safety, morals or general welfare. In both *Eubank* and *Roberge,* members of the community were given the power to effect or consent to a change in a particular owner's land use. The underlying infirmity was the absence of any assurance in the procedure that those given the power to regulate privately owned land would apply the *Euclid* standard in testing the relationship between the public interest and the action in question.[8] This defect was

---

[8] Petitioner relies to the contrary on *Thomas Cusack Co. v. City of Chicago,* 242 U.S. 526 (1917). That case, as the Ohio Supreme Court recognized, is distinguishable from *Eubank, Roberge* and the present case. *Cusack* involved an ordinance prohibiting certain billboards. The ordinance had been adopted by the City Council and was fully effective. Variances in the prohibition were permitted with the consent of those community members directly affected, and this was upheld. The present case, on the other hand, deals with a procedure whereby a change in use is validated as reasonable by City Council, but cannot become effective without City-wide approval by the electorate. This procedure clearly falls within *Eubank* and *Roberge* rather than *Cusack.* This same distinction was drawn in *In re Hetrick's Appeal* 391 Pa. 148, 137 A.2d 310 (1958); *Robwood Advertising Ass'n, Inc. v. City of Nashua,* 102 N.H. 215, 153 A.2d 787 (1959); and *Schalte v. Garnett,* 186 Kan. 117, 348 P.2d 629 (1960).

particularly evident in *Roberge*, where the legislative body had determined by its adoption of the change that the proposed building was in fact "in harmony with the public interest." 278 U.S. at 121.

There is no essential distinction by which Eastlake may avoid for its consent procedure the same fate visited by this Court on the consent ordinances in *Eubank* and *Roberge*. Eastlake's planning and zoning process, prior to the 1971 amendment, was typical of those rational zoning procedures which were developed, virtually nationwide, out of *Euclid v. Ambler*. Eastlake adopted a comprehensive zoning plan reflective of the public health, safety, morals and general welfare, broadly conceived; and it then provided a procedure for change at the initiative of individual property owners. The rezoning process contemplated submittal to a Planning Commission, the retention of experts and consultants where necessary, a report to the City Council, a formal, noticed hearing where the public could participate,[9] and enactment of the rezoning by the City Council "whenever the public health, safety, necessity, convenience, comfort, prosperity or general welfare, and compliance with the Master Plan or good zoning practice justify the action. . ."[10]

In 1971 Eastlake superimposed on this mechanism for rational and reasonable rezoning the overriding requirement that nothing done by the legislative body to enact an individual applicant's change would take effect unless and until consented to by 55% of the electorate. Such a mandatory consent requirement converts the rational scheme for rezoning mandated by *Euclid v. Ambler*, and formerly followed by Eastlake, to a process which by its very nature does not permit the application of due

[9] Charter of the City of Eastlake, Article VIII (A. 52-55).

[10] Codified Ordinances of the City of Eastlake §1165.02 (reproduced in full in the Appendix to this brief at page 25).

process standards and is inherently arbitrary and thus unreasonable.

Under Eastlake's ballot box zoning plan, no mechanism exists for assuring that the voting public has the benefit of the factual underpinning necessary to assess rationally a proposed change in the context of the comprehensive plan and the then existing circumstances. Rather, a 46% minority of those who happen to vote can effectively frustrate a change in use which has been fully validated by the City's planning and legislative process; and they may do so without regard to any standards or, as the Ohio Supreme Court observed, based solely on whim or caprice (Pet. 23, 28).

In matters of rezoning, which directly affect individual rights, the potential for abuse and arbitrary action dictates that decisions be reached by a responsible organ of government, charged with a duty to act reasonably and in a way that demonstrably and consciously can be related to previously established standards. There is no way, under ballot box zoning, for the decision makers to apply the standards enunciated in *Euclid v. Ambler* or to articulate any basis for the decision to accept or reject the requested rezoning. Indeed, as petitioner and its amici curiae are eager to explain, the vote of the electors is impervious to any process for review and examination!![11]

[11] If this principle of ballot box control of zoning were to be sanctioned, judicial review of rezoning decisions would necessarily proceed de novo, thus increasing the burden on the courts and potentially reducing the local control so strongly urged by petitioner. The solution for frustrated public officials, but hardly for the Courts, might be the one recently suggested by the Mayor of Parma, one of the amici curiae, when the voters rejected three constructive rezoning proposals: Have the Council reject desirable rezoning proposals and let the property owner go directly to Court for relief rather than grant the rezoning and risk another turn down by the people. Parma Sun Post, November 13, 1975, at D2. Judicial intervention as an ameliorative solution

(Continued on next page)

The Supreme Court of Ohio recognized these constitutional infirmities in invalidating the Eastlake plan. Its decision should be affirmed.

II. THE DECISION OF THE OHIO SUPREME COURT REAFFIRMS THE CONSTITUTIONAL MANDATE FROM EUCLID v. AMBLER OF RATIONAL DECISION MAKING, KEYED TO A COMPREHENSIVE PLAN, AND IS THUS SUPPORTIVE OF RELATED STATE, FEDERAL AND JUDICIAL POLICIES.

Planning was central to *Euclid v. Ambler*. It was the presence of a comprehensive plan, which, in general application, was not arbitrary or unreasonable, and bore a substantial relation to public health, safety and welfare, which allowed the Court to sustain zoning as a method of regulating the use of private property. The comprehensive plan is also the keystone which supports the validity of the zoning ordinance: If the plan is defective, the zoning necessarily fails, for it is the land use plan which provides the essential constitutional link between the public welfare and the implementing restrictions on private property.[12]

Planning requires a consideration of all of the multiple facets of community development: existing population and projected growth; economic factors and future needs for development; service facilities, including sewers, transportation, public utilities, schools and recreational facilities and the burdens which growth will place on such

(Continued from previous page)

for ballot box rezoning is of course equally unacceptable on a number of grounds, not the least of which is the difficulty of reconciling the decision of the Council to rezone with the refusal of the inscrutable electors to permit it.

[12] *See C. Miller Chevrolet v. Willoughby Hills*, 38 Ohio St. 2d 298, 313 N.E.2d 400 (1974); *Udell v. Haas*, 21 N.Y.2d 463, 288 N.Y.S.2d 888, 235 N.E.2d 897 (1968); Haar, *In Accordance with A Comprehensive Plan*, 68 HARV. L. REV. 1154 (1955).

facilities; the physical facts of the community, both geographic and in relation to its neighboring communities; and the existing and projected tax structure.[13] These are the traditional factors to be considered in meeting the needs of the community. However, a proposed land use plan as "an expression of physical, social and economic goals"[14] must increasingly take into account more sophisticated factors as, for example, the impact of the plan on the environment.[15]

Municipal planning and zoning are also impacted by important state and federal programs. Ohio provides for a regional planning commission with which municipal planning commissions may cooperate in order to develop a comprehensive plan for the region with which municipal planning would be consistent.[16] In addition, the regional commission is charged with offering technical assistance on planning to local units of government, and to reviewing and commenting upon local zoning regulations.[17] The Ohio Department of Economic and Community Development also promotes comprehensive planning by providing technical planning assistance to local and regional planning bodies for land use studies.[18] Thus, Ohio's policy is to enhance the professional quality of local planning efforts with respect to land use.

The federal policy in favor of comprehensive planning is principally embodied in the "701" program of the Department of Housing and Urban Development. A part of the 1954 Housing Act, the purpose of the program is to help local governments solve comprehensive planning problems

[13] ANDERSON, *supra* note 1, §1.03 at 8.

[14] I MCHARG, DESIGN WITH NATURE 93 (paperback ed. 1971).

[15] *Id.*

[16] Ohio Revised Code §713.23.

[17] *Id.*

[18] Ohio Revised Code §122.06.

and to encourage the establishment and improvement of planning staffs and techniques.[19] Grants may be made to states to be passed through to municipalities. However, the activities assisted must be "carried out by professionally competent persons" and the planning process must take into account the housing needs of both the region and local communities.[20] The Federal Water Pollution Control Act, as amended in 1972, also mandates planning to deal with water pollution,[21] including land use restrictions necessary to control pollution.[22]

The single thread which runs from *Euclid v. Ambler* through these diverse but interrelated land use planning efforts is the need and inevitability of change. Just as change is itself a reality of life, so must comprehensive land use planning, with its implementing zoning regulation, be continually evaluated for possible modifications.[23] Zoning, moreover, carries within itself a unique necessity to remain flexible rather than immutable: Since zoning impinges directly on the free use of private property, there must be a rational means, keyed to due process, for granting alterations in use and exceptions and variances which are responsive to individual needs as they arise within the framework of the comprehensive plan.

Where, in the Eastlake scheme of ballot box zoning, is there room for the discrete judgments required in order to effectuate those inevitable changes generated by individual needs and altered circumstances while still retaining the basic objectives of the comprehensive plan?

How can a voter, as he marks his consent ballot, assess

[19] 40 U.S.C.A. §461(a) *as amended* (Supp. 1975).

[20] 40 U.S.C.A. §461(b) *as amended* (Supp. 1975).

[21] 33 U.S.C. §1251(a)(5) (Supp. II, 1972).

[22] 33 U.S.C. §1288(b) (Supp. II, 1972).

[23] See *Euclid v. Ambler*, 272 U.S. 365, 386-387; *Cheney v. Village 2 at New Hope, Inc.*, 429 Pa. 626, 241 A.2d 81 (1968); 3 ANDERSON *supra* note 1, §17.14 at 307.

whether the proposed zoning change is reasonable, is within the terms of the comprehensive plan, and meets the constitutional standards?

Under the Eastlake plan these judgments cannot be made; and experience has demonstrated this to be true. In the brief period between the adoption of the Eastlake Charter amendment and its invalidation by the Ohio Supreme Court in this case, no less than seventeen suburbs surrounding Cleveland proper adopted voter consent ordinances or charters of the Eastlake type.[24] To respondents knowledge, not one proposal by an individual property owner for a change in zoning has since received voter approval. Illustrative is the result of the November, 1975 election in the City of Parma, one of the amicus curiae supporting petitioner. In Parma, a city with a population of 100,000, the property owner faces a twofold consent hurdle. The Parma ordinance requires a 50% favorable vote in the City at large and a 50% approval by those voting in the very ward in which the property to be rezoned is situated.[25] Three rezoning requests, having been previously adopted by City Council after public hearing, went to the polls for voter consent and all three were defeated both City-wide and in the particular wards where situated. Ballot box zoning is quite obviously not a procedure for rezoning but rather a permanent enactment of the status quo.

What then is the true meaning and objective of these Eastlake type plans?

[24] A listing of these suburbs, showing population and voter registration, is provided in the Appendix to this brief at page 27. There were seventeen voter consent plans in effect when this case was briefed before the Ohio Supreme Court. Garfield Heights and North Olmsted indicate in their Amicus Brief that they have since joined the group; and Euclid, a city of 71,000, has indicated, by its amicus participation, an interest in following suit.

[25] The Parma Ordinance is reproduced in the Appendix to this brief at page 25.

The four judge concurring opinion in the Ohio Supreme Court exposed the true nature of these superimposed requirements for voter approval:

> There can be little doubt of the purpose of Eastlake's Charter provision—it is to obstruct change in land use, by rendering such change so burdensome as to be prohibitive. . . .
>
> There is no subtlety to this; it is simply an attempt to render change difficult and expensive under the guise of popular democracy.
>
> . . .
>
> Zoning provisions such as that in Eastlake's Charter have a single motive, and that is to exclude, to build walls against the ills, poverty, racial strife, and the people themselves, of our urban areas. . . . (Pet. 28, 29.)

And there is no denying the awesome truth of these insights. Cleveland and its mature suburbs have now been ringed with Eastlake type restrictions—a veritable choke collar against change in the large lot, single family, residential use predominating in these restrictive suburban communities.[26]

The *Euclid v. Ambler* approval of zoning restraints on private property was grounded in the existence of a plan which provided a reasoned, comprehensive basis for

[26] The map reproduced in the Appendix to this brief at page 29 illustrates the choke collar against change which now constricts Cleveland. This exclusionary phenomenon is not unique. Eminent courts in addition to Ohio's have considered such exclusionary practices and invalidated them. *See Southern Burlington City NAACP v. Twp. of Mt. Laurel*, 67 N.J. 151, 336 A.2d 713 (1975) (*appeal dismissed* 44 U.S.L.W. 3181); *National Land and Investment Co. v. Kohn*, 419 Pa. 504, 215 A.2d 597 (1965); *Appeal of Girsh*, 437 Pa. 237, 263 A.2d 395 (1970); *Appeal of Kit-Mar Builders, Inc.*, 439 Pa. 466, 268 A.2d 765 (1970); *Bristow v. City of Woodhaven*, 35 Mich. App. 205, 192 N.W.2d 322 (1971); *Board of Supervisors of Fairfax County v. Williams*, 216 Va. 49, 216 S.E. 2d 33 (1975).

dealing with individual property owners in differing ways. The zoning ordinance sustained in *Euclid* provided a reasonable basis for implementing the land use plan and a mechanism for resolving disputes and making changes. The Eastlake scheme of ballot box zoning effectively destroys these underlying premises and is thus destructive of the due process principles on which *Euclid v. Ambler* was grounded.

The Supreme Court of Ohio recognized this absence of any constitutional justification for Eastlake's mandatory consent procedure. Its decision should be affirmed.

III. THE DECISION OF THE SUPREME COURT OF OHIO DOES NOT IMPAIR THE RIGHT OF THE PEOPLE TO VOTE.

It has been urged that the decision of the Supreme Court of Ohio denies the people the right to vote; and the petitioner and its amici curiae have liberally garnished this assertion with such halcyon phrases as "participatory democracy", "maintenance of people's power", "government by the people" and "cherished right to vote."

This argument, imbued with rhetoric and based in major part upon various voting-rights cases, is ill-conceived and without substance. The issue in this case is not the disenfranchisement of any portion of the populace, but rather it is the appropriateness, under due process, of community-wide ballot-box decision making as part of a rezoning procedure which impinges directly on an individual property owner.

There is of course no denial of public participation in zoning matters, either in Eastlake or elsewhere. The public is assured by Charter and ordinance of a deliberative process which includes open meetings of specialized planning and zoning bodies, public reports and recommendations, and ultimate action by elected officials to

whom have been delegated the measurable duty of acting in accordance with standards prescribed by the legislature or judiciary. Moreover, the concepts of public notice and public hearings permeate the zoning process. The affected public is therefore assured of its voice and its influence;[27] and in the end those officials who are not adequately responsive face rejection from office at the polls.

Under the Constitution, however, the people are not free, absent due process protections, to assume direct decisional control over each and every individual property owner's exercise of his rights. Zoning, by its very nature, involves restraints imposed under the police power on the exercise of individual rights. It is this fact that mandates that zoning decisions be made by a body which can be charged with the duty of applying the proper due process standards; and it is in this sensitive balancing of individual rights against the public interest that the distinction lies between day to day zoning decisions and those governmental policies which may properly be subjected to a mandatory referendum process.[28]

This is the distinction inherent in the case of *James v. Valtierra*, 402 U.S. 137 (1971). *Valtierra*, as the Ohio Supreme Court noted, did not concerning zoning, but rather authorization to a public body to develop, construct or acquire low-rent housing. The California Supreme

[27] *See* text accompanying notes 9 and 10 *infra* and 1 ANDERSON, *supra* note 1, §4.02-4.03 at 156-59.

[28] This inherent characteristic of zoning and rezoning is demonstrated by the fact that some courts treat zoning as judicial or administrative rather than purely legislative. *Fasano v. Board of County Com'rs of Washington City*, 264 Or. 574, 507 P.2d 23 (1973); *Bird v. Sorenson*, 16 Utah 2d 1, 394 P.2d 808 (1964); *West v. City of Portage*, 392 Mich. 458, 221 N.W.2d 303 (1974); *Fleming v. City of Tacoma*, 81 Wash. 2d 292, 502 P.2d 327 (1972); *Cooper v. City and County of Denver*, 536 P.2d 874 (Colo. 1975). The very fact that rezoning requires a public hearing is evidence of its inherent need for due process safeguards.

Court had earlier held that the actions of local housing authorities, established to take advantage of federal financing for low-rent housing, were not subject to California's referendum provisions. The California Constitution was then amended to provide that no public body might develop, construct or acquire any low rent housing until the project had been approved at a referendum election.

Citizens claiming they qualified for low-rent housing challenged the referendum requirement on the basis that it effectively deprived them of low-rent housing and was therefore violative of the Supremacy Clause, the Privileges and Immunities Clause and the Equal Protection Clause. *There was no due process claim nor were the rights of any individual property owner directly at issue.* In upholding this referendum requirement, Mr. Justice Black, speaking for this Court, drew the critical distinction:

> [Referendum approval of low-rent public housing projects] ensures that all the people of a community will have a voice in a decision which may lead to large expenditures of local governmental funds for increased public services and to lower tax revenues . . . 402 U.S. 137, 143.

Valtierra involved, not an exercise of the police power to restrain individual property rights in the context of rezoning, but a broader, general policy decision regarding public sponsored low cost housing which would impact on public services and funds.[29]

It is this same distinction which also inheres in those few situations for which Ohio provides a mandatory ref-

[29] Petitioner strains to blur the overriding public policy basis of *Valtierra* by stressing that respondent sought to construct an apartment, whereas the issue here is not the particular rezoning but the due process deficiencies of the Eastlake procedure. The *Valtierra* distinction is also present in *Southern Alameda Spanish Speaking Organization v. City of Union City Cal.*, 424 F.2d 291 (9th Cir. 1970) and *Ranjel v. City of Lansing*, 417 F.2d 321 (1969) *cert. den.* 397 U.S. 980, cited by petitioner.

erendum. As the Ohio Supreme Court recognized, the initial enactment by County Commissioners or Township Trustees of a comprehensive zoning code for the unincorporated area of a county or township is clearly a community policy decision for the unincorporated area, affecting all landowners equally, not just a single property owner, and thus only indirectly involving individual rights. Where, however, changes are later required in such a county or township plan, those *rezoning* issues, directly affecting as they do the individual property owner, are *not* subject to mandatory referendum.[30]

There is a constitutional imperative for this distinction between zoning per se, as a broad community policy, and preservation of a reasonable means for effecting change in response to individual needs and circumstances. Zoning, as an exercise of the police power, involves the balancing of individual property rights against the public welfare. It is clear that the myriad of technical land-use matters which must be considered are not appropriate for a direct community-wide exercise of police power, especially in view of the accompanying deprivation of due process rights. The Ohio Supreme Court dealt with this point succinctly:

> It can scarcely be contended that every proposed land use change, no matter how small, in a city with a population of 20,000, either involves or allows community-wide policy-making. Rather, most involve hardships affecting individual parcels of property, which must be alleviated to preserve the constitutional validity of the ordinance. (Pet. 25.)

There may be areas, as in the case of the initial imposition of a comprehensive land use plan, where the community's interest in prescribing the policies regarding use of land, as those policies affect and benefit all property

[30] Ohio Revised Code §§303.12, 519.12.

owners alike, will negate an individual owner's claim that in such instances the police power must be exercised in the same manner as when his property rights are directly and tangibly at issue as in the case of rezoning. The vice in the Eastlake scheme is its failure to draw any distinctions. In its reach, the Eastlake Charter encompasses even those land use decisions regarded by the Ohio Court as administrative rather than legislative.[31] This scheme does not reflect that reasonable margin for error spoken of in *Euclid v. Ambler,* but is instead a gross overreaching, destructive of the balancing of interests required by due process.

CONCLUSION

This case has generated as many viewpoints as there are parties and amicus participants. Respondent has intentionally eschewed commenting on all of them. One thing seems certain, however: This case does not represent an assault upon the referendum process, properly viewed, or on responsible government.

The stakes rather lie in how a community may constitutionally constrict the avenues of changes which since *Euclid v. Ambler* have been essential ingredients in the constitutionality of the rezoning process. An individual property owner is constitutionally protected by the due process requirement that rezoning procedures be so designed as to result in reasonable restrictions reasonably referable to the police power standards of health, safety, morals and the general welfare.

Eastlake superimposed on an otherwise traditional zoning system a requirement for 55% voter approval be-

[31] The Ohio Supreme Court held that to the extent the Charter amendment would require a referendum on those matters traditionally characterized as administrative, for example hardship variances which are provided for by Charter or ordinance and do not require a rezoning, it was clearly invalid. (Pet. 15-17).

fore any change, no matter how thoroughly supported and insignificant to the community at large, could become effective. The Supreme Court of Ohio, in a searching exploration through the two opinions of Justices Brown and Stern, viewed this Eastlake scheme as lacking in those protections to the individual property owner necessary under due process and as having a stultifying effect on change inimicable to this fundamental requirement for valid land use control.

For the reasons so thoroughly set forth by the Ohio Supreme Court, and those developed above, the decision below should be affirmed.

Respectfully submitted,

WILLIAM D. GINN
MICHAEL M. HUGHES
STEPHEN L. BUESCHER
THOMPSON, HINE AND FLORY
1100 National City Bank Building
Cleveland, Ohio 44114
Attorneys for Respondent

APPENDIX

Codified Ordinances of the City of Eastlake §1165.02:

CHANGE BY ORDINANCE.

Whenever the public health, safety, necessity, convenience, comfort, prosperity or general welfare, and compliance with the Master Plan or good zoning practice justify the action, and after consideration by the Planning Commission, Council may change by ordinance the districts or the regulations established by this Zoning Code, subject to the provisions of Article VIII, Section Three of the Charter.

Codified Ordinances of the City of Parma §1229.01:

(a) Any amendment to, or change in, the existing zoning laws of the City, originating with the Council, shall be submitted to the Planning Commission, which shall be allowed a reasonable time, not less than thirty days, for consideration and report to Council. After such consideration and report, Council shall hold a public hearing on such proposed amendment or change, giving not less than thirty days notice of the time and place thereof, in two newspapers of general circulation within the City; and during such thirty days the text or copy of such ordinance or measure, proposing such amendment or change, and all papers pertaining thereto and the report of the Planning Commission shall be on file with the Clerk of the Council for public examination.

That any change to the existing land uses or any change whatsoever to any ordinance, or the enactment of any ordinance referring to other regulations controlling the development of land and the selling or leasing or rental of parkways, playgrounds, or other city lands or real property, or for the widening, narrowing, re-locating,

vacating, or changing the use of any public street, avenue, boulevard, or alley cannot be approved unless and until it shall have been submitted to the Planning Commission, for approval or disapproval. That in the event the City Council should approve any of the preceding changes, or enactments, whether approved or disapproved by the Planning Commission, it shall not be approved or passed by the declaration of an emergency, and it shall not be effective, but it shall be mandatory that the same be approved by a majority vote of the Electors of the City, and of each Ward in which the property so changed is located, said rezoning to be voted on at the regular municipal election, if one shall occur not less than sixty (60) or more than one hundred twenty (120) days after its passage; otherwise, at a special election falling in the generally established day of the primary election. The City Auditor shall advertise, the requested land use change in the newspaper of general circulation, whose circulation is either the largest, or second to the largest within the limits of the City for two consecutive times, with at least two weeks between notices, and a third notice one week prior to the election.

(b) If this section is violated and a building is under construction or completely constructed it shall be mandatory for the Mayor, Safety Director, Service Director and Building Inspector equally, to have the building or structure removed completely within sixty (60) days at the owner's expense.

Cleveland Suburbs Having or Supporting Mandatory Voter Consent Requirements for Changes in Land Use[1]

	Population[2]	Reg. Voters[3]
Bay Village	18,163	10,056
Broadview Heights	11,463	5,234
Eastlake	19,690	7,024
*Euclid	71,552	36,559
Garfield Heights	41,417	20,118
*Highland Heights	5,926	3,077
Independence	7,034	4,093
*Kirtland	5,530	2,329
Mayfield Village	3,548	1,930
*Middleburg Heights	12,367	6,945
Moreland Hills	3,000	1,685
North Ridgeville	13,152	4,608
Olmsted Falls	2,504	1,218
*Parma	100,216	47,448
Pepper Pike	5,933	3,169
*Seven Hills	12,700	6,495
Strongsville	15,182	6,366
Westlake	15,689	7,648
*Willoughby Hills	5,247	2,749
*Willowick	21,237	8,743

[1] Cities participating as amicus curiae are indicated with an asterisk.

[2] Population figures are for 1970. Ohio Almanac, 69-71 (1974).

[3] Election figures are also for 1970. Ohio Election Statistics 1971-1972, 366-337 (1973).

Cleveland Suburbs Having or Supporting Mandatory Voter Consent Requirements for Changes in Land Use